IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

PHAGE DIAGNOSTICS, INC.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. N19C-07-200 MMJ [CCLD]
v.	)	**FILED UNDER SEAL**
	)	
CORVIUM, INC.,	)	
	)	
Defendant.	)	

Submitted: January 7, 2020
Decided: March 9, 2020

On Defendants' Motion to Dismiss
DENIED

OPINION

Patricia A. Winston, Esq., (Argued), Edward M. McNally, Esq., Kathleen A. Murphy, Esq., Morris, James, LLP, Wilmington, Delaware, *Attorneys for Plaintiff*

Michael McMahon, Esq., (Argued), Luke Cadigan, Esq., Cooley LLP, Boston, Massachusetts, Alexander Miller, Esq., Cooley LLP, San Diego, California, D. McKinley Measley, Esq., Corinne R. Moini, Esq., Morris, Nichols, Arsht & Tunnell, LLP, Wilmington, Delaware, *Attorneys for Defendant*

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiff Phage Diagnostics, Inc., ("Plaintiff") brought this fraud action against Defendant Corvium, Inc. ("Defendant"). Phage purchased Defendant's

pathogen detection business and its related technology ("DETECT") from Defendant (the "Transaction").

Parties

Plaintiff is a Delaware corporation and wholly-owned subsidiary of Institute for Environmental Health, Inc. ("IEH"). IEH partners with food companies to implement proactive approaches to manage food safety risks.[1] IEH created Plaintiff for the purpose of purchasing Defendant's DETECT business.[2] IEH is not a party to these proceedings.

Defendant is a Delaware corporation.[3] Defendant was formerly known as Sample6, Inc., and was in the business of designing systems for the testing of food products and food processing environments.[4] While operating as Sample6, Defendant developed and provided testing systems for different pathogens, such as Listeria and Salmonella, under the DETECT and CONTROL brands.[5]

DETECT

Combined, the DETECT products were designed to locate the presence of Listeria and Salmonella in a food product or food processing environment. The

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[1] Am. Compl. ¶ 8.
[2] *Id.*
[3] *Id.* ¶ 9.
[4] *Id.* ¶ 14.
[5] Pl.'s Op. Br., Ex. A at 3 (hereinafter Exec. Summ.); Am. Compl. ¶ 14.

DETECT products are designed to employ cocktails of bacterial viruses called "bacteriophages" to target specific Listeria or Salmonella pathogens by infecting the pathogen with a luminescent enzyme.[6] The luminescent profile then allows for identification of the pathogen, which indicates contamination.[7]

The DETECT products consist of: (1) test kits for identifying Listeria (the "Listeria Test") and Salmonella (the "Salmonella Test," collectively, with the Listeria Test, the "Test Kits"); (2) two different hardware systems used to analyze the Test Kits–the ST System and HT System; and (3) software used to run the Test Kits on the ST System and HT System.[8]

The ST System is a single-tube format designed for in-shift, in-plant testing.[9] The HT System is a 96-well high-throughput format for larger plant-based and third-party testing laboratories.[10] The HT System is intended to run 96 tests at a time while the ST System can run only one.[11]

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[6] Am. Compl. ¶ 15.
[7] *Id.* ¶ 16.
[8] *Id.*
[9] Exec. Summ. At 3; Pl.'s Ex. B at 22 (hereinafter Mgmt. Pres.).
[10] *Id.*
[11] Am. Compl. ¶ 18.

Negotiations and Purchase

IEH representative Dr. Mansour Samadpour attended the International Association for Food Protection meeting in Tampa, Florida on July 9–12, 2017.[12] Plaintiff alleges that at some point during this meeting, Dr. Samadpour met with Defendant representative Dr. Michael Koeris.[13] Plaintiff alleges that Dr. Koeris discussed the DETECT business and "represented that the Salmonella Test for environmental monitoring on the HT System was completely developed, and they were in the process of obtaining [Association of Official Agricultural Chemists ("AOAC")] certification."[14] AOAC certification is a requirement for commercial usage in the United States.[15]

As of August 2017, the ST Listeria environmental test was the only in-shift, in-plant test certified by the AOAC Performance Tested Methods Program. Defendant alleges that it informed Plaintiff that the HT Listeria environmental test was pending certification with the AOAC, and that the HT Salmonella environmental and finished food tests were not expected until Q4 2017 and Q1 2018 respectively, and thus were still in the process of preparing for certification.[16]

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[12] *Id.* ¶ 21.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Mgmt. Pres. At 25, Fig. 2.

Plaintiff alleges that during the Tampa meeting, Dr. Koeris represented that: (1) the DETECT products allowed for the rapid detection of food-borne bacteria through the use of test kits, hardware, and software; and (2) Defendant (then acting as Sample6) had recently marketed the HT System using the Listeria Test for environmental monitoring and currently had one customer using the HT System with the Listeria Test for environmental monitoring.

On July 18, 2017, Dr. Koeris emailed Dr. Samadpour regarding the possible purchase of the DETECT business.[17] On August 25, 2017, Defendant, through its banker, Red Maple Capital, LLC, provided Plaintiff with the DETECT Executive Summary.[18] Among those topics discussed, Phage asserts that Dr. Koeris confirmed that: (1) the Listeria Test Kit was available in both ST Systems and HT Systems; (2) the Salmonella Test Kit for environmental monitoring on the HT System was "ready for launch"; (3) the DETECT products "accurately and sensitively detect all relevant bacterial strains in the design scope"; (4) "[Plaintiff's] production can be performed at scale with simple fill and finish operations"; and (5) the DETECT business was a "[u]nique platform with broad commercially-ready product portfolio for food testing."[19]

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[17] Am. Compl. ¶ 22.
[18] *Id.* ¶ 23.
[19] *Id.* ¶ 24.

On August 28, 2017, Defendant representatives Dr. Koeris, Thomas Phair, and Dr. Narasimham met in person with Plaintiff representatives (the "August 28 Meeting").[20] Plaintiff asserts that Defendant's representatives confirmed Dr. Koeris' previous "representations" about DETECT.[21]

In a second meeting on September 20, 2017, Defendant employees Dr. Koeris, Jim Hammell, Pete Martin and Sophie Daudenarde met with Dr. Samadpour and other of Plaintiff's representatives (the "September 20 Meeting").[22] Plaintiff alleges that, during the September 20 meeting, Dr. Koeris "made essentially the same representations to Dr. Samadpour."[23] Dr. Koeris also provided information contained in a Management Presentation.

Plaintiff alleges that Defendant representatives made various representations about the products on the August 28 and September 20 Meetings. Among those representations, Phage alleges that Defendant stated that: (1) the HT System would allow Plaintiff to "address the critical needs of [] high volume test users";[24] and (2) the Salmonella Test was in the process of AOAC certification.[25]

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[20] *Id.* ¶ 25.
[21] *Id.*
[22] *Id.* ¶ 26.
[23] *Id.*
[24] *Id.* ¶ 27.
[25] *Id.* ¶ 28.

On October 5, 2017, Dr. Narasimham informed Dr. Samadpour that the purchase price for the DETECT business had increased from $9 million to $12 million.[26] Defendant justified the price increase on a competing offer of $12 million from another prospective buyer.[27] Plaintiff agreed to match the $12 million offer and close within two weeks.[28]

Asset Purchase Agreement

On October 10, 2017, Plaintiff and Defendant executed the Asset Purchase Agreement ("APA") whereby Plaintiff purchased the DETECT business from Defendant for $12 million.[29] Subsequent to the sale of DETECT, Defendant changed its name from Sample6 to Corvium.[30]

The APA provided that Phage accepted the DETECT business "as-is" and "without any warranty of any kind including but not limited to warranties of merchantability or fitness for a particular purpose, and without any obligation to provide any ongoing maintenance or support"[31] beyond the "Software Transition

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[26] *Id.* ¶ 30.
[27] *Id.*
[28] *Id.*
[29] *Id.* ¶ 33.
[30] *Id.*
[31] APA ¶ 7.2(d).

Period" and "Services Transition Period." During such periods, the APA capped Defendant's liability at $1,000.[32]

The APA limited representations and warranties to the "Fundamental Representations" provided in the APA.[33] The APA further provided that "none of the representations, warranties, covenants and agreements of the parties contained herein shall survive the Closing."[34] The APA also provided that claims arising from the Fundamental Representations could not exceed $1 million, and could not be made after March 31, 2018.[35]

The parties also agreed that the APA "and the Exhibits and Schedules attached…constitute the entire agreement and understanding of the parties in respect of the transactions contemplated hereby and supersede all prior agreements, arrangements and understanding," and could only be modified in writing by the parties.[36]

The APA permitted Plaintiff to continue to use Defendant's premises at no cost "in connection with the DETECT business through March 31, 2018."[37] The parties agreed that Defendant would provide to Plaintiff ongoing training and

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[32] *Id.*
[33] *Id.* ¶¶ 5.1, 5.2(a), 5.4, 5.8
[34] *Id.* ¶ 9.3.
[35] *Id.* ¶ 8.1–8.2.
[36] *Id.* ¶ 9.7.
[37] *Id.* ¶ 7.11.

technical support for the DETECT business, including the availability of Dr. Koeris, through December 2018.[38]

Problems with DETECT Products

On April 23, 2018, the only commercial customer using the Listeria Test with the HT System cancelled its contract.[39] Plaintiff claims it discovered serious defects with the HT System.[40] Plaintiff alleges that: (1) the HT System was not capable of high-volume testing, such as running 96 tests at one time;[41] (2) the Salmonella Test failed to detect numerous strains; and (3) the Salmonella Test had not been submitted for AOAC certification.[42] Phage reports that the HT System and Salmonella Test remain unprepared for market launch.[43]

Plaintiff Files this Action

On July 25, 2019, Plaintiff filed an initial two-count complaint seeking relief for fraud and breach of contract ("Initial Complaint"). Defendant filed a Motion to Dismiss the Initial Complaint on September 6, 2019. Plaintiff subsequently dropped its breach of contract claim.

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[38] *Id.* ¶¶ 7.2(c), 7.6.
[39] Am. Compl. ¶ 34.
[40] *Id.* ¶ 35.
[41] Pl.'s Ans. Br. at 9.
[42] Am. Compl. ¶ 35.
[43] *Id.* ¶ 36.

Plaintiff filed its Amended Complaint ("Amended Complaint") on October 4, 2019. In its Amended Complaint, Plaintiff raises one count of fraud in the inducement against Defendant. Plaintiff seeks damages in an amount to be determined at trial.

Defendant filed a Motion to Dismiss on October 25, 2019. Plaintiff filed its answering brief on December 4, 2019. Defendant filed a reply brief on December 20, 2019. The Court heard oral argument on January 7, 2019.

STANDARD OF REVIEW

In a Rule 12(b)(6) Motion to Dismiss, the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[44] The Court must accept as true all well-pleaded allegations.[45] Every reasonable factual inference will be drawn in the non-moving party's favor.[46] If the claimant may recover under that standard of review, the Court must deny the Motion to Dismiss.[47]

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[44] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[45] *Id.*
[46] *Wilmington Sav. Fund Soc'y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).
[47] *Spence*, 396 A.2d at 968.

ANALYSIS

Pleading Fraudulent Inducement

Plaintiff's one-count Amended Complaint only raises a claim for fraudulent inducement. Delaware courts have established that:

> To state a claim for common law fraud, the [plaintiff] must plead facts supporting an inference that: (1) the defendants falsely represented or omitted facts that the defendants had a duty to disclose; (2) the defendants knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendants intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance.[48]

In addition, Superior Court Rule 9(b) provides: "In all averments of fraud…the circumstances constituting fraud…shall be stated *with particularity*."[49] The purpose of Rule 9(b) "is to apprise the adversary of the acts or omissions by which it is alleged that a duty has been violated."[50] Thus, "Delaware courts have held that to satisfy particularity under Rule 9(b) all that is required is that the complaint set forth the *time, place, and contents* of the alleged fraud, as well as the *individual accused* of committing the fraud."[51] The Court "must disregard conclusory allegations

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[48] *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 207 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Bilett*, 931 A.2d 438 (Del. 2007).
[49] Super. Ct. Civ. R. 9(b) (emphasis added).
[50] *Flowshare, LLC v. Geo Results, Inc.*, 2018 WL 3599810, at *3 (Del. Super.) (internal citations and quotations omitted).
[51] *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *6 (Del. Super.) (internal citations and quotations omitted) (emphasis added).

unsubstantiated by specific factual details that would support a rational inference that a particular defendant committed common law fraud."[52]

Further, Rule 9(g) provides:

> A pleading, whether a complaint, counterclaim, cross-claim or a third-party claim, which prays for unliquidated money damages, shall demand damages generally without specifying the amount, except when items of special damage are claimed, they shall be specifically stated....[53]

Although plaintiffs *must* plead damages resulting from alleged misrepresentations,[54] plaintiffs may be plead damages generally.[55]

Defendant argues that Plaintiff failed to plead its fraud claim with sufficient particularity regarding each element of fraud.

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[52] *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004).

[53] Super. Ct. Civ. R. 9(g).

[54] *Cornell Glasgow, LLC v. La Grange Props. LLC*, 2012 WL 2106945, at *8 (Del. Super.); *see also Brevet Capital Special Opportunities Fund, LP v. Fourth Third, LLC*, 2011 WL 345821, at *8 (Del. Super.) ("When the plaintiff fails to allege legally cognizable damages suffered as a result of reliance on any false representation, the claim must be dismissed.").

[55] *See Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 55 (Del. Ch. 2015) (finding that damages were pleaded with particularity in a claim for fraudulent inducement where plaintiff alleged that plaintiff would not have entered into the contract or would have paid much less if the defendant had not made misrepresentations); *see also H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 146–47 (Del. Ch. 2003) (finding plaintiff's allegation that "it suffered damages because of its decision to participate in the February 2001 Offering, which was based on the false representations made by defendants" was "stated with enough particularity to satisfy the requirements of Rule 9(b).").

Misrepresentations and Particularity

Defendant argues that Plaintiff failed to adequately plead that Defendant made any misrepresentations regarding the Listeria and Salmonella HT Systems. Thus, the Court must dismiss Plaintiff's fraud claim.

Plaintiff argues that the Amended Complaint sets forth numerous alleged misrepresentations regarding the HT System and Salmonella Test, including where and by whom those misrepresentations were communicated. Plaintiff alleged that Defendant and its representatives made the following misrepresentations regarding the HT System:

(1) In person in Tampa, Florida sometime between July 9 and 12 of 2017, Dr. Koeris represented to Dr. Samadpour that the HT System was being marketed and had one customer using it.[56]
(2) In an email on August 25, 2017, Defendant represented to Dr. Samadpour that the Listeria Test was already available; production could be performed at scale with simple fill and finish operations; and the Test had a commercially-ready product portfolio.[57]
(3) In the Executive Summary provided to Dr. Samadpour on August 25, 2017, Defendant represented that the Listeria Test was already available; production could be performed at scale with simple fill and finish operations; and the Test had a commercially-ready product portfolio.[58]
(4) In person in Boston Massachusetts on August 28, 2017, Dr. Narasimham, along with Dr. Koeris and Phair, represented to Dr. Samadpour that the Listeria Test for the HT System was launched; and could address the critical needs of high volume test users.[59]
(5) In person in an unknown location on September 20, 2017, Dr. Koeris, along with Hammell, Martin and Daudendare, represented to Dr. Samadpour that

[56] Am. Compl. ¶ 21; Ans. Br. at 5–6.
[57] Am. Compl. ¶¶ 23–24; Ans. Br. at 6–7.
[58] Am. Compl. ¶ 24; Ans. Br. at 6–7.
[59] Am. Compl. ¶¶ 25 & 27; Ans. Br. at 7.

the Listeria Test for the HT System was launched; and could address the critical needs of high volume test users.[60]

(6) In the Management Presentation Defendant provided on September 20, 2017, Corvium represented that the Lysteria Test for the HT System was launched; and would allow Plaintiff to address the critical needs of high-volume test users.[61]

Plaintiff alleged that Defendant and its representatives made the following misrepresentations regarding the Salmonella Test:

(1) In person on sometime between July 9 and 12 of 2017, Dr. Koeris represented to Dr. Samadpour that the Salmonella Test was completely developed and in the process of obtaining AOAC certification.[62]

(2) In an email on August 25, 2017, Defendant represented to Dr. Samadpour that the Salmonella Test was ready for launch; accurately and sensitively detected all relevant bacterial strains in the design scope; production could be performed at scale with simple fill and finish operations; and the Test had a commercially-ready product portfolio.[63]

(3) In the Executive Summary Defendant provided on August 25, 2017, Defendant represented to Dr. Samadpour that the Salmonella Test was ready for launch; accurately and sensitively detected all relevant bacterial strains in the design scope; production could be performed at scale with simple fill and finish operations; and the Test had a commercially-ready product portfolio.[64]

(4) In person in Boston, Massachusetts on August 28, 2017, Dr. Narasimham, along with Dr. Koeris and Phair, represented to Dr. Samadpour that the Salmonella Test was ready to be launched; completely developed; accurately and sensitively detected all relevant bacterial strains in the design scope; production could be performed at scale with simple fill and finish operations; had a commercially-ready product portfolio; and was in the process of obtaining AOAC certification.[65]

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[60] Am. Compl. ¶¶ 26 & 27; Ans. Br. at 7–8.
[61] Am. Compl. ¶¶ 26–28; Ans. Br. at 7–8.
[62] Am. Compl. ¶ 21; Ans. Br. at 5–6.
[63] Am. Compl. ¶¶ 23–24; Ans. Br. at 6–7.
[64] Am. Compl. ¶ 24; Ans. Br. at 6–7.
[65] Am. Compl. ¶ 25; Ans. Br. at 7.

(5) In person on September 20, 2017, Dr. Koeris, along with Hammell, Martin and Daudendare, represented to Dr. Samadpour that the Salmonella Test was in the process of obtaining AOAC certification.[66]
(6) In the Management Presentation Defendant provided on September 20, 2017, Defendant represented that the Salmonella Test was ready for launch; accurately and sensitively detected all relevant bacterial strains in the design scope; and initial customers were evaluating HT Salmonella environmental test.[67]

Defendant contends that the Court may disregard these allegations because they are conclusory and unsupported by specific facts.[68] The Court is "not required to accept every strained interpretation of the allegations proposed by the plaintiff," and "must disregard conclusory allegations unsubstantiated by specific factual details that would support a rational inference."[69]

Defendant also argues that the evidence included in its motion contradicts Plaintiff's allegations that Defendant made misrepresentations. "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."[70] Further, Defendant urges the Court to dismiss the fraud claim on these grounds because "a claim may be dismissed if allegations in the complaint or

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[66] Am. Compl. ¶ 28; Ans. Br. at 7–8.
[67] Am. Compl. ¶¶ 26–28; Ans. Br. at 7–8.
[68] *See Alston v. Admin. Office of the Courts*, 2018 WL 1080606, at *1 (Del.); *see also Sheldon v. Pinto Tech. Ventures, L.P.*, 2019 WL 4892348, at *3 (Del.).
[69] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[70] Super. Ct. R. 10(c).

in the exhibits incorporated into the complaint effectively negate the claim as a matter of law."[71]

Defendant is, in fact, "entitled to show the trial court the actual language or the complete context" of any documents properly submitted as part of the motion to dismiss record.[72] However, this principle does not stand for the proposition that, in the context of a motion to dismiss, the Court can weigh contradictory evidence in the dismissal record.[73] Therefore, the Court will refrain from weighing any such evidence provided in the dismissal record.

Defendant also argues that Plaintiff failed to adequately plead its claim for fraud because Plaintiff relies on alleged statements that "constitute future predictions" or "mere puffery." "Predictions about the future cannot give rise to actionable common law fraud."[74] Defendant claims that it merely made a prediction when it represented that its HT Salmonella test was "expected" to launch in Q4. Thus, Plaintiff cannot rely on this statement.

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[71] *In re Gardner Denver, Inc.*, 2014 WL 715705, at *7 n. 59 (Del. Ch.) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).
[72] *See Hughes*, 897 A.2d at 169; *Phoenix Mgmt. Tr. v. Win S. Credit Union*, 2019 WL 1575272, at *5 (Del. Ch.) (noting that courts are "permit[ted] to review the actual document to ensure that the plaintiff has not misrepresented its contents").
[73] *See In re Gardner Denver, Inc.*, 2014 WL 715701, at *4 ("[T]his Court commonly considers extraneous documents, not for the truth of their contents, but to test the sufficiency of allegations for disclosure-based claims."); *see also L & R Saunders Assoc. v. Bank of America*, 2012 WL 4479232, at *5 (Del. Super.) (denying a motion to dismiss a claim for fraudulent inducement because "[t]he context from which the Court can draw clues is potentially discoverable and not permissibly considered on a motion to dismiss…[w]ithout further context, no conclusions regarding the statement's meaning can be presently made.").
[74] *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 554 (Del. Ch. 2001).

"Puffery" denotes "vague statement[s] boosting the appeal of a service or product" that are not misleading. Such statements "cannot form the basis for a fraud claim."[75] Defendant specifically refers to the following statements as puffery: (1) the DETECT products allowed for the rapid detection of food-borne bacteria through the use of test kits, hardware, and software;[76] (2) [Plaintiff's] production can be performed at scale, with simple fill and finish operations;[77] (3) the DETECT business was a unique platform with a broad, commercially-ready product portfolio for food testing;[78] and (4) the HT System would allow Plaintiff to address the critical needs of high volume test users.[79] Defendant suggests that these statements are so inherently vague as to render them immaterial.[80]

Plaintiff contends that these statements cannot be considered mere puffery or future predictions if they were made with an intent to deceive, even if the statements were presented as opinions, estimates, or projections.[81] Plaintiff claims that Defendant knew it provided inaccurate information about DETECT products with the intent to influence Plaintiff's decision to purchase DETECT. For

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[75] *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *8; *see also WyPie Investments, LLC v. Homschek*, 2018 WL 1581981, at *7 (Del. Super.) ("[A] company's optimistic statements praising its own skills, experience, and resources" are not actionable).
[76] Am. Compl. ¶ 21.
[77] *Id.* ¶ 24.
[78] *Id.*
[79] *Id.* ¶ 27.
[80] Op. Br. at 22.
[81] *See Clark v. Davenport*, 2019 WL 3230928, at *12 (Del. Ch.).

example, Plaintiff refers to two alleged misrepresentations regarding the Salmonella Test: (1) the Salmonella Test was "*expected* to launch" in Q4 of 2017; but also (2) was "*ready* for launch" on August 25, 2017, prior to Q4 of 2017. Plaintiff argues that the latter statement was a known falsehood and the projected launch date was designed to further mislead.

Viewing the facts under the light most favorable to Plaintiff, the Court finds that there exists, at minimum, a question of fact as to whether Defendant's statements were affirmative statements or mere puffery. The Court finds that Plaintiff has complied with Rule 9(b) requirements, as interpreted by case precedent, and stated fraud claims with sufficient particularity as to the allegations of misrepresentations to survive Defendant's motion to dismiss.

Knowledge and Intent

Rule 9(b) provides that plaintiffs may plead knowledge and intent *generally*.[82] "[T]he particularity requirement must be applied in light of the facts of the case, and less particularity is required when the facts lie more in the knowledge of the opposing party than of the pleading party."[83] "[A] claim of fraud…that has at its core the charge that the defendant knew something, there must, at least be sufficient well-pleaded facts from which it can reasonably be

[82] Super. Ct. Civ. R. 9.
[83] *H-M Wexford*, 832 A.2d 129, 146 (Del. Ch. 2004) (citing *Carello v. PricewaterhouseCoopers, LLP*, 2002 WL 145111, at *8 (Del. Super.)).

inferred that this something was knowable and that the defendant was in a position to know it."[84]

Defendant developed DETECT and was in exclusive control of the product prior to the sale. Thus, Plaintiff contends that Defendant's superior position to know the true status and capability of DETECT provides sufficient basis for a reasonable inference that Defendant had knowledge about alleged defects in the DETECT products.

Plaintiff relies on *Aviation West Charters, LLC v. Freer*.[85] The plaintiff in *Aviation West* had purchased defendants' medical air transportation service. Plaintiff alleged in its complaint that defendants intentionally overstated the company's accounts receivable to inflate the company's value.[86] The *Aviation West* Court found that plaintiffs allegations were sufficient because "the 'something' that the [defendants] allegedly knew was that the [accounts receivable] was falsely inflated."[87]

Plaintiff also relies on *H-M Wexford LLC v. Encorp, Inc.*[88] The *H-M Wexford* plaintiff alleged that the defendant made false financial representations in a stock purchase agreement, that defendant knew of the falsity, and defendant

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[84] *Aviation West Charters, LLC v. Freer*, 2015 WL 5138258, at *7 (Del. Super.).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] 832 A.2d 129 (Del. Ch. 2003).

made such misrepresentations with the intent to induce plaintiff into participating in a respective offering.[89] On motion to dismiss, the Court found plaintiff's allegations sufficient.[90]

Here, Plaintiff has alleged that Defendant made numerous misrepresentations in connection with the sale of its DETECT business, that Defendant knew such representations were false, and that Defendant made those statements to induce Plaintiff to purchase the DETECT business. Therefore, the Court finds that Plaintiff has sufficiently pled knowledge and intent to survive Defendant's Motion to Dismiss for failure to plead with particularity regarding knowledge and intent.

Reliance

Defendant requests that the Court find that Plaintiff did not reasonably rely on Defendant's alleged misrepresentations. Defendant relies on three examples.

First, Defendant argues that Plaintiff could not have justifiably relied on Defendant's product representations because Plaintiff was responsible for conducting its own due diligence. Plaintiff claims that it had insufficient time to conduct due diligence because it closed early on the purchase of DETECT at the behest of Defendant. Thus, Plaintiff contends it reasonably relied on Defendant's

[89] *Id.* at 145.
[90] *Id.*

product representations. Defendant counters that Plaintiff had sufficient time because Plaintiff admits that discussions regarding the sale of DETECT began four months prior to closing.[91]

Second, Defendant argues that Plaintiff could not have justifiably relied on the Executive Summary in lieu of its own due diligence because the Executive Summary was "prepared solely to allow [Plaintiff] to determine whether [it] would like to enter into a Confidentiality Agreement...."[92] Defendant also insists that the Executive Summary expressly disclaimed any representations made therein,[93] and the APA's limited representations and warranties prohibit Plaintiff's pursuit of claims based on materials outside the scope of the APA.[94]

Third, Defendant argues that Plaintiff failed to explain what further due diligence was necessary that it did not undertake. Defendant notes that the APA was heavily negotiated and that Plaintiff's knowledge and understanding of the DETECT business is evidenced by the APA.

The question of whether a party's reliance is reasonable is generally a question of fact. Reasonableness depends on all of the circumstances.[95] The determination of whether a party reasonably relied on false information "is not

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[91] Am. Compl. ¶ 21.
[92] Exec. Summ. At 2.
[93] *Id.*
[94] *See* APA ¶ 7.2(d).
[95] *TrueBlue, Inc.*, 2015 WL 5968726, at *7.

generally suitable for resolution on a motion to dismiss."[96] The Court will not take judicial notice of facts that are subject to a reasonable dispute at the motion to dismiss stage[97] because "[t]he context from which the Court can draw clues is potentially discoverable and not permissibly considered on a motion to dismiss...."[98]

The extent of Plaintiff's due diligence; the knowledge available to Plaintiff at the time of its alleged reliance; and the degree to which Plaintiff relied on any representations, are potentially discoverable, and heavily fact-involved. Thus, the Court finds that the issue of reliance in this case is a fact-intensive inquiry that is not appropriate for resolution on motion to dismiss. Therefore, Plaintiff's fraud complaint survives Defendant's Motion to Dismiss for failure to plead with particularity regarding justifiable reliance.

Damages

Rule 9(g) provides:

> A pleading, whether a complaint, counterclaim, cross-claim or a third-party claim, which prays for unliquidated money damages, shall demand damages generally without specifying the amount, except when items of special damage are claimed, they shall be specifically stated....[99]

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[96] *Id.*
[97] *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *7 (Del. Ch.).
[98] *L & R Saunders Assoc. v. Bank of America*, 2012 WL 4479232, at *5 (Del. Super.).
[99] Super. Ct. Civ. R. 9(g).

Although plaintiffs *must* plead damages resulting from alleged misrepresentations,[100] they may be plead generally.[101]

Defendant cites *Mooney v. Pioneer Natural Resources Company*.[102] In *Mooney*, plaintiff alleged that he was fraudulently induced into investing in the securities of defendant and consequently suffered a "financial loss."[103] The Court found that plaintiff failed to adequately plead damages because plaintiff did "not identify the type of investment he made in defendant's securities, the amount of that investment, or how the investment related to Defendant's alleged misrepresentations...."[104] The *Mooney* case captures the difference between an insufficient *conclusory* allegation and adequately *generally* pled damages.[105] Where Plaintiff generally pleads damages for fraud, Plaintiff must relate its alleged

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[100] *Cornell Glasgow*, 2012 WL 2106945, at *8; *see also Brevet Capital Special Opportunities Fund*, 2011 WL 345821, at *8 ("When the plaintiff fails to allege legally cognizable damages suffered as a result of reliance on any false representation, the claim must be dismissed.").
[101] *See Prairie Capital III*, 132 A.3d at 55 (finding that damages were pleaded with particularity in a claim for fraudulent inducement where plaintiff alleged that plaintiff would not have entered into the contract or would have paid much less if the defendant had not made misrepresentations); *see also H-M Wexford*, 832 A.2d at 146–47 (finding plaintiff's allegation that "it suffered damages because of its decision to participate in the February 2001 Offering, which was based on the false representations made by defendants" was "stated with enough particularity to satisfy the requirements of Rule 9(b).").
[102] 2017 WL 4857133 (Del. Super.)
[103] *Id.* at *1.
[104] *Id.* at *9.
[105] *Id.* at *9.

injury to the misrepresentations that constitute its grounds for fraud such that the issue of damages may be inferred from the complaint.[106]

Plaintiff cites *H-M Wexford*,[107] wherein defendants argued that plaintiff's complaint failed to allege damages with sufficient particularity. The Court of Chancery found that plaintiff had stated its damages with sufficient particularity when it "alleged that it suffered damages because of its decision to participate in the February 2001 Offering, which was based on the false representations made by the defendants."[108]

Here, Plaintiff alleged that it suffered damages in connection with its purchase of the DETECT business, which it alleges was based on its reliance on false information provided by Defendant. The Court finds that Plaintiff has adequately tied its allegations of fraud to its alleged damages. Therefore, the Court finds that Plaintiff has stated damages with sufficient particularity to withstand Defendant's Motion to Dismiss.

CONCLUSION

Viewing the facts under the light most favorable to Plaintiff, the Court finds that there exists, at minimum, a question of fact as to whether Defendant's

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[106] *Id.* at *9 (comparing the facts of the *Mooney* case to the facts in *Anglo Am. Sec. Fun, L.P. v. S.R. Glob. Int'l Fund, L.P.*, 829 A.2d 143, 156–57 (Del. Ch. 2003)).
[107] *See* discussion *supra* p. 20.
[108] *Id.* at *146–147.

statements were affirmative statements or mere puffery. The Court finds that Plaintiff has complied with Rule 9(b) requirements, as interpreted by case precedent, and stated fraud claims with sufficient particularity as to the allegations of misrepresentations to survive Defendant's motion to dismiss.

Plaintiff has alleged that Defendant made numerous misrepresentations in connection with the sale of its DETECT business, that Defendant knew such representations were false, and that Defendant made those statements to induce Plaintiff to purchase the DETECT business. Therefore, the Court finds that Plaintiff has sufficiently pled knowledge and intent to survive Defendant's Motion to Dismiss for failure to plead with particularity regarding knowledge and intent.

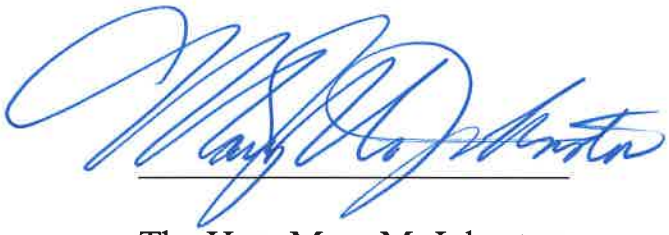
The extent of Plaintiff's due diligence; the knowledge available to Plaintiff at the time of its alleged reliance; and the degree to which Plaintiff relied on any representations, are potentially discoverable, and heavily fact-involved. Thus, the Court finds that the issue of reliance in this case is a fact-intensive inquiry that is not appropriate for resolution on motion to dismiss. Therefore, Plaintiff's fraud complaint survives Defendant's Motion to Dismiss for failure to plead with particularity regarding justifiable reliance.

Plaintiff alleged that it suffered damages in connection with its purchase of the DETECT business, which it alleges was based on its reliance on false information provided by Defendant. The Court finds that Plaintiff has adequately

tied its allegations of fraud to its alleged damages. Therefore, the Court finds that Plaintiff has stated damages with sufficient particularity to withstand Defendant's Motion to Dismiss.

THEREFORE, Defendant's Motion to Dismiss the Amended Complaint for failure to state a claim pursuant to Rules 12(b)(6) and 9(b) is hereby **DENIED.**

IT IS SO ORDERED.



The Hon. Mary M. Johnston